

1999

# Salt Lake City, Plaintiff/Appellee, v. David Woitock, Defendant/Appellant : Brief of Appellant

Utah Court of Appeals

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Andrea J. Garland; Salt Lake Legal Defender Association; Attorney for Defendant/Appellant.

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
K F U

IN THE UTAH COURT OF APPEALS

CKET NO. 990226

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SALT LAKE CITY, : **APPELLATE BRIEF**  
Plaintiff/Appellee, :  
-v- :  
DAVID WOITOCK, : Case No.990226-CA  
Priority No. 2  
Defendant/Appellant. :

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BRIEF OF APPELLANT

Appeal from a conviction and judgment of Battery, a  
Class "B" misdemeanor, in the Third Judicial District Court,  
in and for Salt Lake County, State of Utah, the Honorable  
Sheila K. McCleve, Judge presiding.

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**FILED**

Utah Court of Appeals

JUN - 7 1999

Julia D'Alesandro  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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SALT LAKE CITY,	:	<b>APPELLATE BRIEF</b>
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IN THE UTAH COURT OF APPEALS

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SALT LAKE CITY,	:	<b>APPELLATE BRIEF</b>
Plaintiff/Appellee,	:	
-v-	:	
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Attorney for Plaintiff/Appellee

### STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah Rule of Criminal Procedure 26(2)(a) and Utah Code Annotated § 78-2a-3(2)(f) (1996), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. Appellant, hereinafter, "Mr. Woitock," was convicted of a Battery, a class B misdemeanor, in violation of Salt Lake City Code § 11.08.020.

### STATEMENT OF ISSUES

1. Did the trial court err in not allowing Mr. Woitock to present evidence on the concept of "Community Based Policing" which would have shown the level of care that appellant should have received from the police but did not receive which could have supported appellant's claim of self-defense?

Standard of Review: The standard of review is abuse of discretion. State v. Wetzel, 868 P.2d 64 (Utah 1993).

Citation to Record: Jury Trial Transcript, p. 53, l. 20 through p. 55, l. 12; p. 60, ll. 18 - 26.



Determinative Law: The determinative law is Utah Rule of Evidence 401 .

2. Did the trial court err in sentencing Mr. Woitock to jail and not community service where the appellant was physically disabled and the jail was out of compliance with the Americans With Disabilities Act?

Standard of Review: The issue is a question of law so the appellate court is to give no deference to the trial judge and apply a correction of error standard. Drake v. Industrial Com'n of Utah, 939 P.2d 932 (Utah 1994).

Citation to Record: Sentencing Transcript, p. 4, l. 19 - p. 5, l. 5.

Determinative Law: The determinative law is the Americans With Disabilities Act at 42 U.S.C. §§ 12100 et seq.

#### STATEMENT OF THE CASE

Mr. Woitock appeals from a judgment and conviction imposed for battery, a class B misdemeanor. Mr. Woitock was originally charged in an Information filed on March 26, 1998. The case was tried to a jury on December 7, 1998.

Jury Trial Transcript. Mr. Woitock was convicted as charged and sentenced on January 6, 1999 to ninety (90) days jail with all but ten (10) of those days suspended, a recoupment fee for the services of his attorney, restitution, and was ordered to obtain counseling as part of his probation. Sentencing Trans. P. 4, ll. 8 - 18.

#### STATEMENT OF FACTS

1. Mr. Woitock is disabled. Jury Trial Transcript (hereinafter, "Trial Trans."), page (hereinafter, "p.") 62, line (hereinafter, "l.") 16. Mr. Woitock has three ruptured disks, two narrowed disks in his neck, and a wounded arm from being shot while in the military. Trial Trans., p. 61, ll. 20 - 23, p. 62, ll. 1 - 5. Mr. Woitock walks with a cane and needs physical therapy and medication. Trial Trans., p. 46, ll. 3 - 4, p. 62, ll. 14 - 16, 21.

2. Mr. Woitock's injuries make it difficult for him to move around. He finds it difficult to run and often cannot hold items in his hands without dropping them or keep from knocking things over. Trial Trans., p. 62, ll. 1 - 5.

3. Mr. Woitock also suffers from high anxiety and paranoia. Trial Trans., p. 62, ll. 6 - 16.

4. Mr. Woitock was previously assaulted by students from West High School. Trial Trans., p. 52, ll. 1 - 15, p. 63, ll. 7 - 16.

5. Mr. Woitock reported the assault to Officer Steven Olson but no charges were ever filed. Trial Trans., p. 52, ll. 1 - 15, p. 63, ll. 11 - 20.

6. Students from West High School had previously caused problems in Mr. Woitock's neighborhood by vandalizing property, leaving garbage, and assaulting Mr. Woitock. Trial Trans., p. 59, l. 15 - p. 60, l. 5, p. 63, ll. 7 - 16.

7. Mr. Woitock and his neighbors complained to Officer Steven Olson about neighborhood vandalism but no charges were ever filed. Trial Trans., p. 51, ll. 25 - 26, p. 52, l. 1 - p. 53, l. 20, p. 60, ll. 4 - 15.

8. On March 16, 1998, Alex Headman and his two friends left West High School to throw rocks at the Horace Mann Junior High annex building. Trial Trans., p. 13, l. 4 - 17, p. 14, ll. 2 - 22, p. 16, ll. 15 - 23.

9. Headman and his friends walked into a driveway in search of more rocks and began pulling rocks out of the driveway and throwing rocks from the driveway at the building. Trial Trans., p. 17, l. 25 - p. 18, l. 23; p. 31,

11. 18 - 22.

10. The annex building had been closed for some time. Trial Trans., p. 14, 11. 22 - 24.

11. The annex building had a fence around it (Trial Trans., p. 18, 11. 16 - 21) and had signs posted on and around the building warning that it contained asbestos. Trial Trans., pp. 28, 11. 19 - 21, p. 29, 11. 16 - 19.

12. Mr. Woitock came out of his house (Trial Trans., p. 19, 11. 16 - 21, p. 35, 11. 21 - 23) and began yelling at Headman and his friends. Trial Trans., p. 19, l. 22, p. 32, l. 10, p. 39, 11. 14 - 17, p. 64, 11. 3 - 5.

13. Headman began walking toward the driveway. Trial Trans., p. 22, l. 22, p. 64, 11. 16 - 20.

14. Mr. Woitock feared that Headman and his friends were approaching him with rocks and with the intent to harm him. Trial Trans., p. 65, 11. 12 - 22.

15. Mr. Woitock was also worried about the asbestos from the Horace Mann Junior High annex building. Trial Trans., p. 47, 11. 14 - 19, p. 64, 11. 8 - 10.

16. Mr. Woitock believed his life was in danger. Trial Trans., p. 47, 11. 24 - 25, p. 65, 11. 12 - 22, p. 70, 11. 25 - 26.

17. Mr. Woitock hit Headman on the back of the head with his cane. Trial Trans., p. 22, ll., 22 - 23; p. 33, ll. 25 - 26, p. 69, ll. 12 - 13.

18. Mr. Woitock was sentenced to ninety (90) days in jail, with all but ten (10) days suspended. Sentencing Transcript, p. 4, ll. 8 - 11.

19. Mr. Woitock's counsel proffered to the Judge that the Metro Jail is not in compliance with the Americans with Disabilities Act so that disabled inmates have been injured at the jail, and requested that Mr. Woitock be allowed to perform community service in lieu of jail. Sentencing Transcript, p. 4, l. 19 - p. 5, l. 2.

20. Judge McCleve denied Mr. Woitock's counsel's request for community service in lieu of jail and advised Mr. Woitock's counsel to "arrange for some other jail that will . . . accept him that's more suitable and it can be transferred " Sentencing Transcript, p. 5, ll. 3 - 5.

### SUMMARY OF ARGUMENTS

POINT I: APPELLANT SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE REGARDING THE LEVEL OF POLICE PROTECTION THAT POLICE FAILED TO PROVIDE.

Not allowing appellant to fully set forth evidence regarding the level of care that police strive but failed to provide to appellant was an abuse of discretion. The trial court abused its discretion in refusing to allow relevant evidence which would have illuminated for the jury Appellant's reasons for the actions which led to the offense charged and would have supported Appellant's claim of self defense.

POINT II: IN LIGHT OF MR. WOITOCK'S DISABILITIES THE JUDGE SHOULD HAVE SENTENCED MR. WOITOCK TO COMMUNITY SERVICE.

The trial court erred in sentencing Mr. Woitock to jail in light of his disabilities. Mr. Woitock's counsel proffered evidence that the Salt Lake Metro Jail was out of compliance with the Americans With Disabilities Act, 42 U.S.C. §§ 12100 et seq. Ample case law holds that the Americans With Disabilities Act applies to jails and this Court should give no deference to the sentencing judge's cavalier suggestion that Mr. Woitock's counsel simply find

him a better jail.

### ARGUMENT

POINT I: APPELLANT SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE REGARDING THE LEVEL OF POLICE PROTECTION THAT POLICE FAILED TO PROVIDE.

The evidence that appellant attempted to introduce at trial was relevant and should have been admitted.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah R. Evid. 401.

The evidence that appellant sought to introduce at trial was relevant to appellant’s claim of self defense. Appellant was justified in using force against Mr. Headman because he reasonably believed that force was necessary to defend himself from Mr. Headman’s imminent use of unlawful force. See Ut. Code Ann. § 76-2-402(1). Appellant sought to establish that current police philosophy is to prevent and punish acts of vandalism because once vandalism occurs in a neighborhood, it acts as a precursor to more serious

crimes. Given that the testimony established that Appellant had contacted the police regarding the vandalism and the previous more serious assault that he had suffered, (Transcript, p. 20, l. 23 through p. 53, l. 12, p. 59, l. 22 through p. 60, l. 17; p. 63, ll. 2 - 20), evidence that Appellant had not received the standard of care that police try to provide was relevant to show that Appellant's use of force was reasonable. The evidence which Appellant sought to introduce would have supported his contention that he reasonably believed that he needed to use force against Mr. Headman's imminent use of force.

POINT II: IN LIGHT OF MR. WOITOCK'S DISABILITIES THE JUDGE SHOULD HAVE SENTENCED MR. WOITOCK TO COMMUNITY SERVICE.

The trial court erred in sentencing Mr. Woitock to jail once evidence was proffered that the jail is out of compliance with the Americans with Disabilities Act to a degree that disabled inmates have been injured. Facts, ¶ 19.

The Americans With Disabilities Act (hereinafter, "the Act") prohibits discrimination by public entities against persons with disabilities.



Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (hereinafter, "the Act").

Mr. Woitock is disabled as defined by the Act. The Act defines disability as:

(1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, (2) a record or such impairment, or (3) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Mr. Woitock's physical and mental impairments substantially limit his major life activities. He has difficulty moving around, has poor balance and uses a cane. See Statement of Facts, above, pp. 5 - 6, ¶¶ 1 - 3. Further, he has a record of such impairment and is regarded as having impairment. Statement of Facts, pp. 1 - 3, ¶¶ 5 - 6.

The United States Supreme Court and lower courts have held that the Act applies to state prisons and jails because those are "public entities" as defined at 42 U.S.C. § 12131(1)(B). A "public entity" includes "any department, agency, special purpose district, or other instrumentality

of a State or States or local government." Id. The Supreme Court ruled that state prisons "fall squarely within the statutory definition of 'public entity,' . . . ."

Pennsylvania Dept. of Corrections v. Yeskey, 118 S.Ct. 1952, 1954 (1998); See, also, Saunders v. Horn, 959 F. Supp. 689, 696 - 697 (E.D. Pa. 1996); Carty v. Farrelly, 957 F.Supp. 727, 741 (D. Virgin Islands 1997) ("Correctional facilities are public entities falling under the dictates of the ADA," citing Duffy v. Riveland, 98 F.3d 447, 455 - 56 (9th Cir. 1996)).

Sentencing Mr. Woitock to jail violated Mr. Woitock's rights protected by the Act because it exposed him to danger of injury not suffered by non-disabled inmates. Suggesting that Mr. Woitock's counsel simply find a "more suitable" jail (Sentencing Transcript, p. 4, l. 19 - p. 5, l. 2) violated Mr. Woitock's rights under the Act. In Carty v. Farrelly, the defendant jail housed a non-mentally ill disabled prisoner who used a cane with mentally ill inmates rather than providing defendant with disabled-access to the general population. Carty v. Farrelly, 957 F.Supp. 727, 741. In light of the proffered evidence regarding the jail's lack of access for disabled inmates, the trial court should not


have sentenced Mr. Woitock to jail.

The trial court should have sentenced Mr. Woitock to performing community service in lieu of jail, given his ability to perform such service and the evidence showing that Mr. Woitock was disabled and that the Salt Lake County Metro Jail would not be able to house him without violating the Act. Statement of Facts, p. 8, ¶ 20. The trial court left the issue up to the Jail while knowing that the Jail would violate the Act. That Mr. Woitock's rights were violated was completely predictable and preventable. The trial court erred in its sentence.

### CONCLUSION

This Court should correct the trial court's abuse of discretion and error. The trial court failed to allow in relevant evidence which would have supported Mr. Woitock's claims of self defense. The trial court erred in sentencing Mr. Woitock to jail while knowing that his rights would be violated in jail. This Court should vacate the trial court's verdict and remand the case for a new trial. Alternatively, this Court should amend Mr. Woitock's sentence.

SUBMITTED this 7<sup>th</sup> day of June, 1999.

  
ANDREA J. GARIAND  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, ANDREA J. GARLAND, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 S. State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to the officer of the Salt Lake City Prosecutor, 451 S. 200 East, Salt Lake City, Utah 84111, this 7<sup>th</sup> day of June, 1999.

  
ANDREA J. GARLAND

DELIVERED to the Utah Court of Appeals and the Salt Lake City Prosecutor's office this \_\_\_\_ day of June, 1999.

\_\_\_\_\_

## ADDENDUM A

*Andrea Garland*

Third District Court, State of Utah  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT, DIVISION II  
~~451 South 200 East, Salt Lake City, Utah 84111~~  
450 S. State

SENTENCE/JUDGMENT/ORDER  
Criminal/Traffic

CITY/STATE \_\_\_\_\_ Plaintiff, Case Number 987905364  
-VS- \_\_\_\_\_ Tape Number \_\_\_\_\_ C # \_\_\_\_\_  
David Waitock Date ~~1/17/99~~ 1/6/99 Time \_\_\_\_\_  
Defendant Judge/Comm McClure  
DOB: 12/17/50 Clerk LS  
Interpreter \_\_\_\_\_ Plaintiff Counsel Robinson  
CHARGES Battery Defense Counsel Andrea Garland  
Amended \_\_\_\_\_ Amended \_\_\_\_\_

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

(1) Jail 90 days Suspended 80 days FW 10 days  
Defendant to Commence Serving Jail Sentence \_\_\_\_\_  
(2) Fine Amt. \$ \_\_\_\_\_ Susp. \$ \_\_\_\_\_ Fee \$ \_\_\_\_\_ Fine Bal \$ \_\_\_\_\_  
\_\_\_\_\_

TOTAL FINE(S) DUE \$

Payment Schedule: Pay \$ \_\_\_\_\_ per month/1st Pmt. Due \_\_\_\_\_ Last Pmt. Due \_\_\_\_\_

(3) ~~Witness Fees~~ Court Costs \$ 55.50 - \$9 = \$46.50 due 7/6/99  
(4) Community Service/WP \_\_\_\_\_ through restitution amount submitter  
(5) Restitution \$ \_\_\_\_\_ Pay to: ☐ Court ☐ Victim ☐ Show Proof to Court to be determined by city within 45 days.  
Attorney Fees \$ 250 by 7/6/99  
(6) Probation 1 year ☐ Good Behavior ☐ AP&P ☒ ACEC ☐ Other report within 48 hours after release  
(7) Terms of probation:  
☒ No Further Violations ☒ Counseling thru ACEC  
☐ AA Meetings \_\_\_\_\_ / wk \_\_\_\_\_ / month ☐ Classes \_\_\_\_\_  
☐ Follow Program ☒ In/Out Treatment ACEC  
☐ No Alcohol ☐ Health Testing \_\_\_\_\_  
☐ Antibus ☒ Crime Lab Procedure  
☐ Employment \_\_\_\_\_ once the restitution amount is determined  
☐ Proof of \_\_\_\_\_ he debt has 90 days to appeal.  
otherwise pay restitution by 7/6/99  
(8) Plea in Abeyance/ Diversion \_\_\_\_\_  
(9) Review \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ at \_\_\_\_\_

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7391, at least three working days prior to the proceeding.

APPEAL MUST BE FILED WITHIN 30 DAYS OF JUDGMENT

*[Signature]*  
District Court Judge  
STATE OF UTAH  
DISTRICT COURT  
SALT LAKE COUNTY